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No. 98-1760

# In the Supreme Court of the United States

OKLAHOMA DEPARTMENT OF PUBLIC SAFETY,
PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), violates the Tenth Amendment.

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 161 F.3d 1266. The opinion of the district court (Pet. App. 17-32) is reported at 994 F. Supp. 1358.

### JURISDICTION

The judgment of the court of appeals was entered on December 3, 1998. A petition for rehearing was denied on February 2, 1999. Pet. App. 33-34. The petition for a writ of certiorari was filed on May 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. This case involves a constitutional challenge brought by the State of Oklahoma to the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), which restricts disclosure of personal information from state motor vehicle records.[1] An individual who seeks a driver's license from his State's department of motor vehicles (DMV) is generally required to give the state DMV a range of personal information, including his name, address, telephone number, and in some cases medical information that may bear on the driver's ability to operate a motor vehicle. In some States, the motor vehicle department also requires a driver to provide his social security number (SSN) and takes a photograph of the driver. State DMVs, in turn, often sell this personal information to other individuals and businesses.[2]

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[1] The DPPA was enacted as part of an omnibus crime control law, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXX, § 300002, 108 Stat. 2099. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held hearings on the DPPA on February 3 and 4, 1994. Those hearings were never printed, and we are informed by the Clerk of the Judiciary Committee that the Committee no longer has documents or transcripts relating to the DPPA hearings. The principal prepared submissions to the Subcommittee are available on WESTLAW. See *Protecting Driver Privacy: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 2d Sess., *available at* 1994 WL 212813, 212822, 212833, 212834, 212835, 212836, 212696, 212698, 212701, 212712, 212720 (Feb. 3-4, 1994).

[2] Representative Moran, a sponsor of the DPPA, observed: "Currently, in 34 States across the country anyone can walk into a DMV office with your tag number, pay a small fee, and get your name, address, phone number and other personal information—no questions asked." 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994);

Although DMVs generally charge only a small fee for each particular sale of information, aggregate revenues are substantial. For example, New York's motor vehicle department earned $17 million in one year from individuals and businesses that used the State's computers to examine driver's license records. See 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

The personal information sold by DMVs is also used extensively to support the marketing efforts of corporations and database compilers. See 1994 WL 212836 (Feb. 3, 1994) (statement of Richard A. Barton, Direct Marketing Association) ("The names and addresses of vehicle owners, in combination with information about the vehicles they own, are absolutely essential to the marketing efforts of the nation's automotive industry."). This information "is combined with information from other sources and used to create lists for selective marketing use by businesses, charities, and political candidates." *Ibid.* See also 1994 WL 212834 (Feb. 3, 1994) (statement of Dr. Mary J. Culnan, Georgetown University) (describing use of DMV information by direct marketers).

The highly publicized 1989 murder of actress Rebecca Schaeffer brought to light the potential threat to privacy and safety posed by this commerce in motor vehicle record information. Schaeffer had taken pains to ensure that her address and phone number were not publicly listed. Despite those precautions, a stalker was

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see also 139 Cong. Rec. 29,466 (1993) (statement of Sen. Boxer); *id.* at 29,468 (statement of Sen. Warner); *id.* at 29,469 (statement of Sen. Robb); 1994 WL 212834 (Feb. 3, 1994) (statement of Dr. Mary J. Culnan, Georgetown University); 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

able to track her down by obtaining her home address through her state motor vehicle records. See 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran). Evidence gathered by Congress revealed that that incident was similar to many other crimes in which stalkers, robbers, and assailants had used state motor vehicle records to locate, threaten, and harm victims.[3]

Moreover, Congress received evidence indicating that a national solution was warranted to address the problem of potentially dangerous disclosures of personal information in motor vehicle records. Marshall Rickert, Motor Vehicle Administrator for the State of Maryland, who testified in support of the legislation on behalf of the American Association of Motor Vehicle Administrators, emphasized that technological advances had dramatically increased the accessibility of state motor vehicle records, but that "many state laws have not kept pace with technological advancements, and permit virtually unlimited public access to driver and motor vehicle records." 1994 WL 212696 (Feb. 4, 1994). Accordingly, he urged that "uniform national standards are needed." *Ibid.* In addition, among the incidents brought to Congress's attention were ones in which stalkers had followed their victims across state lines. See 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty).

2. Based on evidence about threats to individuals' privacy and safety from misuse of personal information

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[3] See, *e.g.*, 1994 WL 212698 (Feb. 4, 1994) (statement of Rep. Moran); 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty, National Victim Center); 1994 WL 212833 (Feb. 3, 1994) (statement of Donald L. Cahill, Fraternal Order of Police); 139 Cong. Rec. 29,469 (1993) (statement of Sen. Robb); *id.* at 29,470 (statement of Sen. Harkin).

in state motor vehicle records, Congress enacted the DPPA to restrict the disclosure of personal information in such records without the consent of the individual to whom the information pertains. The DPPA prohibits any state DMV, or officer or employee thereof, from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. 2721(a).[4] The DPPA defines "personal information" as any information "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information," but not including "information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. 2725(3).

The DPPA bars only nonconsensual disclosures. Thus, DMVs may release personal information for any use, if they provide individuals with an opportunity to opt out from disclosure when they receive or renew their licenses. See 18 U.S.C. 2721(b)(11). In addition, a DMV may release personal information about an individual to a requester if the DMV obtains consent to the disclosure from the individual to whom the information pertains. See 18 U.S.C. 2721(d). A DMV also may disclose information about an individual if the requester has that individual's written consent. 18 U.S.C. 2721(b)(13).

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[4] A "motor vehicle record" is defined as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. 2725(1).

The DPPA explicitly disclaims any restriction on the use of motor vehicle information by "any government agency," including a court, and also "any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. 2721(b) (1). It also expressly permits DMVs to disclose personal information for any state-authorized purpose relating to the operation of a motor vehicle or public safety. 18 U.S.C. 2721(b)(14).

The DPPA does not preclude States from disclosing personal information for other uses in which Congress found an important public interest. Thus, States may disclose personal information in their motor vehicle records for use in connection with car safety or theft, driver safety, and other motor-vehicle related matters, 18 U.S.C. 2721(b)(2); by a business to verify the accuracy of personal information submitted to that business, and further to prevent fraud or to pursue legal remedies if the information the individual submitted to the business is revealed to have been inaccurate, 18 U.S.C. 2721(b)(3); in connection with court, agency, or self-regulatory body proceedings, 18 U.S.C. 2721(b)(4); for research purposes, if the personal information is not further disclosed or used to contact the individuals, 18 U.S.C. 2721(b)(5); by insurers in connection with claims investigations, anti-fraud activities, rating, or underwriting, 18 U.S.C. 2721(b)(6); to notify owners of towed or impounded vehicles, 18 U.S.C. 2721(b)(7); by licensed private investigative agencies or security services for permitted purposes, 18 U.S.C. 2721(b)(8); by employers to verify information relating to a holder of a commercial driver's license, 18 U.S.C. 2721(b)(9) (1994 & Supp. III 1997); for use in connection with private tollways, 18 U.S.C. 2721(b)(10); and in certain circumstances for bulk distribution for surveys,

marketing, or solicitation, if individuals are provided an opportunity, "in a clear and conspicuous manner," to prohibit such use of information pertaining to them, 18 U.S.C. 2721(b)(12).

The DPPA also regulates, as a matter of federal law, the resale and redisclosure of personal information obtained from state DMVs, 18 U.S.C. 2721(c) (1994 & Supp. III 1997), and it prohibits any person from knowingly obtaining or disclosing any record for a use not permitted by the DPPA, or providing false information to a state agency to circumvent the DPPA's restrictions on disclosure, 18 U.S.C. 2722(a). The DPPA sets forth penalties and civil remedies for knowing violations of the Act. Any "person" (defined to exclude any State or state agency) who knowingly violates the DPPA may be subject to a criminal fine. 18 U.S.C. 2723(a), 2725(2). A state agency that maintains "a policy or practice of substantial noncompliance" with the DPPA may be subject to a civil penalty imposed by the Attorney General of not more than $5000 per day for each day of substantial noncompliance. 18 U.S.C. 2723(b). Any person who knowingly obtains, discloses, or uses information from a state motor vehicle record for a use not permitted by the DPPA may also be subject to liability in a civil action brought by the person to whom the information pertains. 18 U.S.C. 2724. The States, however, have no obligation themselves to regulate the use of information obtained under the Act or to pursue legal remedies against any requester who obtains or uses information in violation of the Act.

3. Oklahoma law provides that summaries of traffic records must be made available to any person upon payment of a $10 fee for each motor vehicle record released. Okla. Stat. Ann. tit. 47, § 6-117(H) (West 1997 & Supp. 1999). The Oklahoma Open Records Act, how-

ever, creates an exception to Oklahoma's general open records policy "where specific state or federal statutes create a confidential privilege." Okla. Stat. Ann. tit. 51, § 24A.2 (West 1997 & Supp. 1999).

Oklahoma brought this action in federal district court, alleging that the DPPA exceeds Congress's constitutional powers, and seeking an injunction against enforcement of the DPPA. The district court granted summary judgment for the State and entered a permanent injunction against the Act's enforcement. Pet. App. 17-32. The district court ruled (*id.* at 27-30) that this case is controlled by *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). Because the States must comply with the DPPA's requirements, the court concluded that the DPPA is, "like the statutory provision at issue in *New York*, 'a simple command to state governments to implement legislation enacted by Congress.'" Pet. App. 27 (quoting *New York*, 505 U.S. at 176).[5]

4. The court of appeals reversed. Pet. App. 1-16. The court found this case to be different from *New York* and *Printz*, and to be governed instead by *South Carolina* v. *Baker*, 485 U.S. 505 (1988), which upheld the application of federal law to state entities, even if the federal law imposes prohibitions and obligations on the States. See Pet. App. 14-16.

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[5] The district court also rejected the government's argument that, because Oklahoma law does not require the disclosure of records privileged under federal law, the DPPA does not conflict with Oklahoma law, and therefore Oklahoma lacks standing to bring this action. Pet. App. 21-22 n.6. The court of appeals did not address that point in detail, except to state that "Oklahoma's open record laws and federal legislation preventing disclosure of information contained in motor vehicle records are in conflict." *Id.* at 2.

The court observed that, "[u]nlike the federal statute in *New York*, the DPPA does not commandeer the state legislative process by requiring states to enact legislation regulating the disclosure of personal information from motor vehicle records." Pet. App. 13. Instead, "the DPPA directly regulates the disclosure of such information and preempts contrary state law." *Ibid.* The court likewise observed that "[u]nlike the federal statute in *Printz*, the DPPA does not conscript state officials to enforce federal law." *Id.* at 14. The court noted that, "[u]nder the DPPA, enforcement is the job of federal officials." *Ibid.*

The court explained that its "conclusion that the DPPA differs from the statutes at issue in *New York* and *Printz* is buttressed by" this Court's decision in *South Carolina* v. *Baker*, *supra*. Pet. App. 14. As the court explained, the provision upheld in *Baker*, removing the federal tax exemption for bearer bonds issued by state and local governments, "imposed a burden only on state and local governments." *Ibid.* Nonetheless, "*Baker* rejected the notion that the federal government may never force a state wishing to engage in certain activity to take administrative or legislative actions to comply with federal standards." *Ibid.* Indeed, *Baker* "referred to federal regulation of state activity as 'a commonplace that presents no constitutional defect.'" *Ibid.* (quoting *Baker*, 485 U.S. at 515).

"Finding the logic in *Baker* controlling," the court rejected Oklahoma's challenge to the DPPA. Pet. App. 15-16. The court expressly rejected the contrary conclusion reached by the panel majority in *Condon* v. *Reno*, 155 F.3d 453 (4th Cir. 1998), cert. granted, No. 98-1464 (May 17, 1999), and endorsed the reasoning of the dissent in that case. Pet. App. 10-12.

## DISCUSSION

The question presented in this case is the same as the question presented in *Reno* v. *Condon*, cert. granted, No. 98-1464 (May 17, 1999). Accordingly, the petition in this case should be held pending the decision in *Condon*, and then disposed of as appropriate in light of the decision in that case.

## CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Reno* v. *Condon*, cert. granted, No. 98-1464 (May 17, 1999), and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

JUNE 1999